since the party who remarried may have lived anywhere in the interim since the termination of the original relation. And, logically developed, the above position would lead to the result achieved by the Oklahoma court which held, that, although the records of the counties of known residence showed no divorce, the deserting party might yet have obtained a divorce elsewhere.[22] But the sensible rule seems to be that the presumption may be rebutted if the records of the counties of residence of both parties to the first marriage show no divorce.[23]

THE RIGHT OF CREDITORS AGAINST SUBSCRIBERS TO CORPORATE STOCK ISSUED IN RETURN FOR OVERVALUED PROPERTY. — That an examination of the nature and extent of a creditor's right against a subscriber to stock issued for overvalued property is desirable, becomes clear in view of the persistently inadequate treatment accorded this question.[1] A., B. and C. were the incorporators of a company with a capital stock of $60,000, promoted by A., B., C. and D. Stock to the par value of $21,900 was issued as fully paid up to A. and B. in return for a secret process turned in by them.[2] The promoters did not believe the secret process to be worth $21,900 at the time, but they believed the corporation would be able to earn a dividend on a capital stock of $60,000. The "value" of the process was determined by subtracting the value of the other corporate assets from $60,000. D. contracted to buy of the incorporators, for $15,000, one half of the total capital stock, of a par value of $30,000, reserving an option to quit the company at any time and receive back his money. After paying $13,600, D. exercised his option and, on the surrender of the shares to the company, received from it a mortgage to secure the indebtedness. The trustee in bankruptcy petitioned to have the mortgaged property applied to the payment of the general creditors, who became such after D. filed his mortgage. The court refused to grant such relief.

The whole question has been confused by the lack of any clear analysis of the nature of the problem. Many American courts have concluded that by common law the issue of stock for overvalued property is in law a fraud on the creditors, for whose benefit subscriptions to stock are held as a trust fund.[3] From this follows the prevailing notion that the pro-

[22] Haile *v.* Hale, 40 Okla. 101, 135 Pac. 1143.

[23] Smith *v.* Fuller, 138 Iowa 91, 115 N. W. 912; Sullivan *v.* Grand Lodge, 97 Miss. 218, 52 So. 360; Hammond *v.* Hammond, 43 Tex. Civ. App. 284, 94 S. W. 1067; and Wingo *v.* Rudder, 103 Tex. 150, 124 S. W. 899, present sane variations.

[1] See Durand *v.* Brown, 236 Fed. 609.

[2] It was held in O'Bear-Nester Glass Co. *v.* Antiexplo Co., 101 Tex. 431, 106 S. W. 180, that an unpatented secret formula was not "property" within the meaning of a similar statute. It is submitted that the principal case presents the better view in holding this secret process to be "property" within the statute.

[3] The doctrine was invented by Story, J., in Wood *v.* Drummer, 3 Mason (U. S. C. C.) 308. Perhaps the best known case invoking the doctrine is Scovill *v.* Thayer, 105 U. S. 143. Without resorting to the statute under which the corporation was formed, the court declared, in regard to the issue of shares at a discount, that such a transaction "is a fraud in law on its creditors, which they can set aside. . . . The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors."

priety of the value placed upon the property by the incorporators depends upon their good faith and lack of wicked motives — upon the absence of some species of common law fraud.[4] But on common law principles, it is hard to see why a corporate person, like any other person, may not create against itself such obligations as it pleases, subject of course to the laws of deceit and fraudulent conveyances. To make it improper for it to create against itself an obligation which a natural person might properly create against himself, requires some statutory prohibition. This calls for a careful analysis of the statutes under which the corporation was organized.[5]

The corporation in the principal case was specifically authorized to issue stock in return for property; and the value placed on this property by the incorporators is declared to be conclusive "in the absence of actual fraud." [6] The court held that a conscious and gross overvaluation

[4] The weight of American authority has followed this doctrine, even into questions of statutory construction, to the extent that the criterion of propriety is taken to be "fraud," and not statutory illegality. See Coffin *v.* Ransdell, 110 Ind. 417, 11 N. E. 20; Coit *v.* Gold Amalgamating Co., 119 U. S. 343; Penfield *v.* Dawson Town & Gas Co., 57 Neb. 231, 77 N. W. 672; Hospes *v.* Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N. W. 1117. See also Horton *v.* Sherrill-Russell Lumber Co., 147 Ky. 226, 143 S. W. 1053.

[5] Lord Herschell said, in Ooregum Mining Co., Ltd. *v.* Roper, [1892] A. C. 125: "Except when the legislature has expressly or by implication forbidden any act to be done by a company, their rights must be governed by the ordinary principles of law, and they are free to make . . . such contracts as they please." This, it is submitted, states the only common-law principle applicable to the situation.

In Hospes *v.* Northwestern Mfg. & Car Co., *supra*, Mitchell, J., said: "This 'trust-fund' doctrine, commonly called the 'American Doctrine,' has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application." In speaking of Wood *v.* Drommer, where the notion had its origin, he says: "Upon old and familiar principles this was a fraud on creditors. Evidently all that the eminent jurist meant by the doctrine was that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution among the stockholders, — a proposition that is sound upon the plainest principles of common honesty. . . . In the case of *Wabash, etc. R. Co.* v. *Ham*, 114 U. S. 587, the court said: 'The property is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of the debtor in fraud of the existing creditors is void.' This is probably what is meant when it is said, as in *Clark* v. *Bever*, 139 U. S. 96, 110, that the capital stock is a trust fund *sub modo*. . . . But it means very little, for the same thing could be truthfully said of the property of an individual or of a partnership."

See also New Haven Horse Nail Co. *v.* Linden Spring Co., 142 Mass. 349, 7 N. E. 773.

The much-criticised opinion in Southworth *v.* Morgan, 205 N. Y. 293, 98 N. E. 490, may be explained on the ground that the court did not have before it the provisions of the statute under which the corporation was organized.

[6] PUBLIC ACTS, MICH., 1903, No. 232, provides that the articles of incorporation should state: "*Fourth*, the amount of total authorized capital stock, which shall not be less than one thousand dollars and not more than twenty-five million dollars; the amount subscribed shall not be less than fifty per cent of the authorized capital stock; *Fifth*, the number of shares in which the capital is divided, which shall be of a par value of ten dollars or one hundred dollars each; *Sixth*, the amount of the capital stock paid in at the time of executing the articles, which shall not be less than ten per cent of the authorized capitalization, and in no case less than one thousand dollars, except in case of a capitalization of two thousand dollars or under, when it shall be twenty-five per cent thereof. . . . Such capital stock may be paid in, either in cash or in property, real or

of the present cash value of the property was not improper.[7] Undoubtedly this is sound if the premise, noted above, that "actual fraud" necessarily includes some element of bad faith and intention to deceive, is sound. The meaning of "actual fraud" important for our purposes is that in which the Michigan legislature used it, and not as the common law may have interpreted it.

The Michigan legislature prescribed that stock must have a certain money par value, and that such stock "may be paid in, either in cash or in property." Standing alone, these requirements indicate an intention that the stock "may be paid in, with reference to the par value, either in money or in money's worth." Further, limits in terms of dollars and cents are prescribed for the capital stock, indicating an intention to regulate the monetary size of the corporation, and an assumption that the capital stock shall be paid in money or full money's worth. The provisions that the corporation must start with one half its capital stock subscribed to, and one tenth actually paid in, points to the same intention and assumption. And the requirement that in case property is received an itemized description and statement of the value put on each item must be filed, provides a safeguard for the enforcement of these provisions. These considerations seem to indicate clearly that the legislature contemplated that the par value of the capital stock should represent the amount of assets received in return, that the number of dollars' worth of stock issued should equal the number of dollars' worth of value received. Under this statute, no sensible meaning can be placed on "value" other than "present value in money." Under this interpretation alone can the legislative intent be carried out.[8] Construed, the statute reads, "that the incorporators shall fix the present

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personal; but where payment is made otherwise than in cash there shall be included in the articles an itemized description of the property in which such payment is made, with the valuation at which each item is taken, which valuation shall be conclusive in the absence of actual fraud."

[7] This is in accord with what is probably the weight of American authority. Under a statute essentially like that in the principal case, but not containing the "actual fraud" clause (which would appear to make the requirements more strict than in the principal case), see Coffin *v.* Ransdell, *supra;* Coit *v.* Gold Amalgamating Co., 119 U. S. 343; Penfield *v.* Dawson Town & Gas Co., *supra;* Hospes *v.* Northwestern Mfg. & Car Co., *supra.* Under a statute in all essentials like that in the principal case, see Monk *v.* Barnett, 113 Va. 635, 75 S. E. 185, in which the court declared that the statute did away with and replaced the "common law"; Medler *v.* Hotel Co., 6 N. M. 331, 28 Pac. 551. In Graves *v.* Brooks, 117 Mich. 424, 75 N. W. 932, patents worth $20,000 were capitalized at $100,000, but the court held that the stockholders were not liable to creditors; that it was necessary to show not only an overvaluation, but that it was "either an intentional fraud in fact, or such reckless conduct . . . that fraud may be inferred"; and in Bank *v.* Belington Coal Co., 51 W. Va. 60, 41 S. E. 390, the court declared: "Our statute throws the gate wide open for the sale of stock and purchase of property in payment therefor at such price and on such terms and conditions as the contracting parties may agree upon." *Cf.* Dieterle *v.* Paint & Enamel Co., 143 Mich. 416, 107 N. W. 79. See also *In re* Wragg, Ltd., [1897] 1 Ch. 796.

[8] In See *v.* Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843, Pitney, V. C., in construing provisions of a statute essentially like those in the principal case, said: "The intent of the legislature, expressed in these sections in question manifestly was, that the capital stock of all corporations should at the start represent the same value whether paid for in property or money. That result can only be obtained by supposing that the property is to be appraised at its actual cash value." See Elyton Land Co. *v.* Birmingham Co., 92 Ala. 407, 9 So. 129.

value in money of the property, *which* valuation shall be conclusive in the absence of actual fraud." The incorporators admittedly did not believe $21,900 to be the present value in money of the secret process. They knew it to be only a slight fraction of this amount. When charged by the legislature to fix the present cash value, the incorporators wilfully substituted an honest, but highly speculative, estimate of future worth. This, it is submitted, was "actual fraud" within the statute, and the valuation was illegal.[9]

The creditors are entitled to take advantage of this illegality.[10] It is for their benefit, if for anyone's, that the legislature has created it. They do so by requiring the subscriber to pay in enough to make up the par value of his stock. This obligation runs to and can be enforced against a purchaser with notice of the stock from the shareholder.[11] The result is that if nothing more were present the creditors in the principal case would be entitled to have D. pay in the difference between the actual value of the process when turned in and $21,900.

But the court further declared that, even if the issue of stock was a wrong to these creditors, D. escaped such liability through the exercise of his option and the filing of his mortgage before the creditors' rights arose. Such action by an individual in a situation analogous to that of the corporation would have been proper. Again we have a question of statutory

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[9] Construing a statute essentially like that in the principal case, but not containing the "actual fraud" provision, several courts have held improper an issue of stock for property taken at a value known to the parties to be in excess of its actual present value. See Douglass *v.* Ireland, 73 N. Y. 100; Berry *v.* Rood, 168 Mo. 316, 67 S. W. 644. And in See *v.* Heppenheimer, *supra*, Pitney, V. C., said: "Nor is it necessary that conscious overvaluation or any other form of fraudulent conduct on the part of these primary valuers should be shown to justify judicial interposition. Their honest judgment, if reached without due examination of the elements of value, or if based in part on an estimate of matters not property, or if plainly warped by self-interest, may lead to a violation of the statutory rule as surely as would corrupt motive." And in Herron *v.* Shaw, 165 Cal. 668, 133 Pac. 488, the court said: "The further fact found by the court that the directors acted in good faith and honestly believed that the property could and would be developed so that its market value would eventually exceed [the value put upon it] will not relieve or excuse the stockholders from such liability. It is the value of the property at the time of the exchange that determines the liability." See also Gillett *v.* Chicago Title & Trust Co., 230 Ill. 373, 82 N. E. 891. These decisions, although not having presented to the court the construction of "actual fraud," give us, it is submitted, the proper basic construction of a statute such as the one in the principal case, narrowing our inquiry to the effect of the added liberalizing "fraud" clause.

Further, the word "fraud" as used in connection with the valuation of such property has not been given, by many well-reasoned authorities, a strict common-law meaning requiring a wicked intent to defraud. See Hastings Malting Co. *v.* Iron Range Co., 65 Minn. 28, 34, 67 N. W. 652, 654; Johnson *v.* Tenn. Oil Co., 74 N. J. Eq. 32, 69 Atl. 788; Lester *v.* Bemis Lumber Co., 71 Ark. 379, 74 S. W. 518.

Under a statute in all essentials like that in the principal case, the following cases held a similar overvaluation illegal: Dilzell Engineering Co. *v.* Lehmann, 120 La. 273, 45 So. 138; Crawford *v.* Rohrer, 59 Md. 599; Holcombe *v.* Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618; Hobgood *v.* Ehlen, 141 N. C. 344, 53 S. E. 857.

[10] Since all the creditors in the principal case are subsequent to the issue of the stock, and have no notice, actual or constructive, of the nature of such issue, they are entitled upon any theory of the nature of the obligation. As to whether the trustee in bankruptcy is the proper person to enforce the obligation, see 29 HARV. L. REV. 854.

[11] Allen *v.* Grant, 122 Ga. 552, 50 S. E. 494; Coleman *v.* Howe, 154 Ill. 458, 39 N. E. 725.

construction. We have seen that the legislature means to regulate the corporation so that the amount of the capital stock issued by it should be no greater than the present value of the assets it received in return. This procedure amounts to an unannounced reduction of the announced capital stock. If this is proper, of what purpose or protection are the statutory requirements that stock must have a par value, and that it must be paid in either in money or in money's worth, when the corporation may at will, by buying in its stock, secure the same discrepancy between the par value of its announced stock and the value of its assets which the statute aimed to prevent? Furthermore, the Michigan legislature has prescribed a statutory method for reducing the capital stock.[12] This makes it doubly certain that such a reduction as that practiced in the principal case was illegal.[13]

But it is objected that the creditors in this case cannot complain, for they should have known of this reduction because the mortgage was filed before they dealt with the corporation. But even conceding constructive notice of the covert reduction of stock, so likely to mislead subsequent creditors, the original wrongful issue remains. The corporation, forbidden to sell stock for overvalued property, may still disregard the illegal portion of the sale and compel the former shareholder to pay the deficiency. Though the creditors in the principal case were subsequent to the return of the stock, they were also subsequent to the illegal issue, and the liability incurred then should not be permitted to be avoided now on the ground of constructive notice of an illegal act.[14]

Nor is there any business necessity for legalizing this sort of a transaction. If in fact D. was a creditor who desired later, if things turned out well, to become a stockholder, why did he not loan the money in the ordinary way, taking a mortgage back, and reserving an option to become a shareholder? The situation looks far more as if D. became a stockholder for the benefits thereof, with a reservation, if things went wrong, to escape the liabilities.

It follows, then, that the trustee in bankruptcy should be able to set aside the transaction out of which arose D.'s mortgage and also to hold D. liable for any amount up to the difference between the value of the property given for his stock and its par value.

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[12] PUBLIC ACTS, MICH., 1903, No. 232: "The amount of capital stock and the number of shares . . . may be diminished at any annual meeting . . . by a two-thirds vote of the capital stock of the corporation. . . . The president and majority of the directors shall make a certificate thereof, which shall be signed and recorded. . . ."

[13] It is almost universally agreed that such a reduction is void as against existing creditors. See Clapp *v.* Peterson, 104 Ill. 26; Hall *v.* Henderson, 126 Ala. 449, 28 So. 531; Oliver *v.* Rahway Ice Co., 64 N. J. Eq. 596, 54 Atl. 460. But *cf.* Dupee *v.* Boston Water Power Co., 114 Mass. 37. It will be noticed that no statute is necessary to reach this result. It is in its nature a conveyance in defraud of creditors, and would be void if made by a natural person. But the weight of American authority holds such a reduction good as against future creditors. See Vent *v.* Duluth Coffee Co., 64 Minn. 307, 67 N. W. 70; Marvin *v.* Anderson, 111 Wis. 387, 87 N. W. 226; Morgan *v.* Lewis, 46 Ohio 1, 17 N. E. 558. See also Blalock *v.* Kernersville Mfg. Co., 110 N. C. 99, 14 S. E. 501; City Bank *v.* Bruce, 17 N. Y. 507.

[14] This is the English view. Trevor *v.* Whitworth, L. R. 12 A. C. 409. See also Sprague *v.* National Bank of America, 172 Ill. 149, 50 N. E. 19. *Cf.* West Penn. Chemical & Mfg. Co. *v.* Prentice, 236 Fed. 891.

NON-TESTAMENTARY CONVEYANCES TO TAKE EFFECT AFTER DEATH. — A. signs, seals, records, and delivers to B. an instrument drawn in the form of a warranty deed conveying Blackacre to B. and his heirs. Consideration is recited. In the *habendum* is inserted the clause: "this deed to take effect upon the death of the grantor." Courts of final appeal in this country entertain three widely divergent views as to the legal consequences of such a transaction. The Supreme Court of Iowa, in the case of *Shaull* v. *Shaull*,[1] decided last November, held an instrument of this sort to be an attempted testamentary disposition, and void under the Wills Act because of the lack of attesting witnesses.[2] A few courts have construed such a document as a valid conveyance of an estate *in futuro* with a resulting fee in A. subject to a conditional limitation in fee in favor of B.[3] The great majority of the cases seem to take an intermediate position. They hold that the instrument is a valid deed, which apparently vests the fee at once in B., with the enjoyment thereof postponed until A.'s death, or with a more or less vaguely defined "life estate" reserved "by implication" or "operation of law" in A.[4] It is submitted that the second view is the correct one, and that the result reached by the Iowa court is unsound and undesirable.

At the common law a deed purporting to convey an estate *in futuro* was void. Leake gives, as the reason for this rule, that the exigencies of tenure required that the seisin should never be in abeyance, but that there should at all times be a tenant invested with the seisin ready to meet the claims of the lord for the duties and services of the tenure.[5] But since the Statute of Uses such a deed may operate as a bargain and sale to convey an estate *in futuro*.[6] A social reason underlay the courts'

[1] 160 N. W. 36 (Iowa).

[2] The following cases seem in accord: Sperber *v.* Balster, 66 Ga. 317 ("Said deed of gift to be of full effect at my death"); Ransom *v.* Pottawattamie County, 168 Iowa 570, 150 N. W. 657 ("This indenture to be effective after my death"); Turner *v.* Scott, 51 Pa. St. 126 ("In no way to take effect till after death of grantor"); Coulter *v.* Shelmadine, 204 Pa. St. 120, 53 Atl. 638 ("This assignment shall not be of any effect until after my death"); Pinkham *v.* Pinkham, 55 Neb. 729, 76 N. W. 411 ("This deed is to take effect from and after my death"); but see West *v.* Wright, 115 Ga. 277, 41 S. E. 602.

[3] Shackleton *v.* Sebree, 86 Ill. 616 ("This deed not to take effect till after my decease"); Vinson *v.* Vinson, 4 Ill. App. 138 ("Do convey, at my death"); Wyman *v.* Brown, 50 Me. 139 ("This deed is not to take effect during my lifetime"); Abbott *v.* Holway, 72 Me. 298 ("This deed is not to operate as a conveyance until my decease"); Bunch *v.* Nicks, 50 Ark. 367, 7 S. W. 563 ("The deed shall go into full force and effect at my death.")

[4] Abney *v.* Moore, 106 Ala. 131, 18 So. 60 ("This conveyance not to take effect till after my death"); Harshbarger *v.* Carroll, 163 Ill. 636, 45 N. E. 565 ("Only to take effect on death of grantor"); Latimer *v.* Latimer, 174 Ill. 418, 51 N. E. 548 ("To be in force from and after my decease and not before"); Spencer *v.* Robbins, 106 Ind. 580, 5 N. E. 726 ("To be equally divided between them at my decease and after paying my funeral expenses"); Wilson *v.* Carrico, 140 Ind. 533, 40 N. E. 50 ("The above obligation to be of none effect until after the death of the said B. C."); Kelley *v.* Shimer, 152 Ind. 290, 53 N. E. 233 ("This deed is to take effect on and after the death of the grantor"); McLain *v.* Garrison, 39 Tex. Civ. App. 431, 88 S. W. 484, and 89 S. W. 284 ("This deed is to take effect at my death and not before"); Gorham *v.* Daniels, 23 Vt. 600 ("Not to come into possession of it till after my decease"); Lauck *v.* Logan, 45 W. Va. 251, 31 S. E. 986 ("But this deed shall take effect when the said W. L. shall depart this life and not sooner").

[5] Roe *v.* Tranmer, 2 Wils. 75. LEAKE, LAW OF PROPERTY IN LAND, 2 ed., 33.

[6] LEAKE, LAW OF PROPERTY IN LAND, 2 ed., 88. True, a series of Massachusetts

readiness to recognize this indirect effect of the statute. By the reign of Henry VIII the feudal structure of society was fast breaking down. An attempt to curtail the means already evolved for mitigating the burdens of tenure and the feudal system of conveyancing, was not to be tolerated. To-day the same result should be reached. That the instrument was intended primarily to operate under one of our modern statutes permitting the transfer of land by deed, will not preclude it from operating if necessary as a bargain and sale.[7] And, moreover, such statutes would seem to offer a second ground upon which its validity may be rested. Since they dispensed with the feudal requirements of livery of seisin and the like, should not a conveyance under them be entitled to the same freedom in the creation of estates as when made by devise or by conveyance to uses?[8] Indeed many jurisdictions have a separate statute specifically permitting the creation of estates *in futuro* by deed. Of these Iowa is one.[9] If, then, in the instrument we set out to consider, the troublesome clause had read in so many words "the estate to vest," instead of "the deed to take effect" upon the death of the grantor, it would seem impossible to have questioned its validity.[10]

Yet it is to the feeling that somehow or other, even so, the deed would have been invalid that we owe the strained and unfortunate construction placed upon an instrument in the form originally supposed by those courts which follow the Iowa view. Their argument runs as follows: the inserted clause shows an intent on A.'s part not to convey anything *in praesenti*, but only after his death; therefore the instrument is "testamentary," and void for lack of proper attestation. Note there the confusion of two very different intents. That the grantor did not intend to convey an estate *in praesenti* is evident: that, as we have seen, has no bearing upon the validity of the instrument as a conveyance. But to argue that the clause establishes an effective intention that the instrument shall remain revocable is quite a different matter. The document is in form a deed; it has been recorded by the grantor; and its possession voluntarily surrendered to the grantee. Normally the strongest kind of evidence would hardly suffice to rebut the resulting presumption of "delivery" and show that a valid, irrevocable conveyance had

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cases deny this proposition. Wallis *v.* Wallis, 4 Mass. 135; Brewer *v.* Hardy, 22 Pick. 376. But the accidental origin of the Massachusetts doctrine and the fallacy of the reasoning by which the later cases attempted to justify it has been repeatedly pointed out. Wyman *v.* Brown, 50 Me. 139; Abbott *v.* Holway, 72 Me. 298; Chandler *v.* Chandler, 55 Cal. 267. See GRAY, RULE AGAINST PERPETUITIES, § 57. Even in Massachusetts it has been substantially repudiated under cover of a second erroneous doctrine that a money consideration will support a covenant to stand seized. Trafton *v.* Hawes, 102 Mass. 533.

[7] This is fundamental. See Roe *v.* Tranmer, 2 Wils. 75; Thatcher *v.* Omans, 3 Pick. (Mass.) 521; Foster *v.* Dennison, 9 Ohio 121.

[8] See KALES, FUTURE INTERESTS IN ILLINOIS, § 152. GRAY, RULE AGAINST PERPETUITIES, § 67. See also Kuuku *v.* Kawainui, 4 Hawaiian 515, holding a conveyance *in futuro* valid although the Statute of User was not in force.

[9] IOWA, CODE OF 1897, § 2917. A good example of the spirit in which such a statute is, however, sometimes construed is found in Leaver *v.* Gauss, 62 Iowa 314, 17 N. W. 522.

[10] Some courts, however, have done so. See, for example, Blackstock *v.* Mitchell, 67 Ga. 768 ("Bargain and sell . . . unto the said J. P. . . . at our death"). And compare Leaver *v.* Gauss, 62 Iowa 314, 17 N. W. 522, referred to in note 9, *supra*.

not in fact been made. Insistence to the extent necessary to accomplish that result, upon the literal meaning of the words, is surely unsound once the validity of estates *in futuro* is freely acknowledged. For they are then capable of another construction, consistent with, instead of squarely opposed to, the other evidence of the grantor's intent. Clearly the true intent, however inaptly expressed, was merely to postpone the vesting of the estate given. Many additional arguments support this view. It may well be urged that the grantor must have intended to accomplish something, and must in fact have known that without witnesses the instrument could not operate as a will.[11] Then it is well recognized that "it is the duty of a court to seek by construction to maintain rather than to defeat the deed." [12] In short, to construe a clause, the intended meaning of which is scarcely even doubtful, so as to invalidate the entire document and thwart the other clearly expressed intentions of the maker is as undesirable as it is unnecessary. It offers an example worthy of three centuries ago of the technicality and injustice of which the law is sometimes capable. It can only be explained as the result of an extraordinary harking back to a feudal notion of the invalidity of estates *in futuro* which the courts that interpreted the Statute of Uses definitely repudiated.

As to the state of the authorities, it is to be noted that the majority of the cases are of the intermediate class already alluded to.[13] These in so far as they hold the deed valid and irrevocable are in accord with the position contended for. In so far, however, as they shun the possibility of an estate *in futuro*, and rely upon an implied reservation of a life estate, they are, it is submitted, unsound. The law is strongly opposed, always, to the implication of life estates.[14] The language used would seem to negative any intention that the grantee should acquire an estate in the land during the grantor's life. And as we have seen, it is unnecessary to resort to any such implication.[15]

FRANCHISE TAXES ON CORPORATIONS INCORPORATED IN MORE THAN ONE STATE. — A recent case in the United States Supreme Court raises the question of the effect of incorporation of the same body under the laws of several states upon the taxing power of each of the incorporating states under the due process clause of the Constitution. *Kansas City, M. & B. R. Co.* v. *Stiles*, 37 Sup. Ct. Rep. 58.[1] It is not due process to

[11] That is the argument of the court in McLain *v.* Garrison, 39 Tex. Civ. App. 431, 88 S. W. 484.

[12] Trafton *v.* Hawes, 102 Mass. 533.

[13] See note 4, *supra*.

[14] See KALES, FUTURE INTERESTS IN ILLINOIS, § 158 *b*.

[15] Moreover, in a large proportion of these cases the only point in issue was the validity of the deed. Suit had not been brought until after the death of A., when under either view B. held in fee. The discussion of what A. had retained before his death was therefore mere *dictum*.

The case of *In re* Bybee, just reported in 160 N. W. 900 (Iowa), is interesting as possibly showing a tendency to stretch a point in upholding as a will an instrument of the sort here considered, which the same court had previously held invalid as a deed. See Ransom *v.* Pottawattamie County, 168 Iowa 570, 150 N. W. 657, cited in note 2, *supra*.

[1] For a fuller statement of the facts, see RECENT CASES, p. 527.